

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In Re the Matter of the Dependency of: :)	
)	DIVISION ONE
J.R.E.K.,)	
DOB: 03/31/01,)	No. 57510-4-I
J.H.G.K.,)	(Consolidated with
DOB: 10/30/02,)	No. 57511-2-I)
)	
Minor Children.)	UNPUBLISHED OPINION
)	
TRISTA L. SHIRLEY, fna,)	
TRISTA L. KING,)	
)	
Appellant,)	
)	
vs.)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES,)	FILED: September 5, 2006
)	
Respondent.)	
)	

BAKER, J. — The trial court terminated the parental rights of both the fathers and the mother of J.R.E.K. and J.H.G.K. The fathers are deceased or have not appealed, but the mother, Trista Shirley, appeals, challenging the sufficiency of the evidence with respect to several statutory elements. We affirm, because there was

substantial evidence that the trial court could find to be clear, cogent, and convincing, that all reasonably necessary and available services were offered, there was little likelihood that conditions could be remedied in the near future, the continued legal relationship impaired the children's prospects for early integration into a stable and permanent home, and that termination was in the children's best interests.

I.

Trista Shirley started using methamphetamine regularly in 1999, at age 20. By 22, she was involved with Justin Erickson, a fellow meth user. Erickson abused Shirley, but she was afraid to leave him. They were evicted in 2000, and lived in Erickson's car, then in a house he was watching for a friend who was in prison for domestic violence. Shirley and Erickson conceived J.R.E.K. For three months when she did not yet know she was pregnant, and for one month after she did know, Shirley continued to use meth. She got no prenatal care until six months into her pregnancy, when she moved in with her aunt and stayed clean until the birth of J.R.E.K. on March 31, 2001. Then Shirley lived with Richard Perscheid, her new fiancé and another meth user. Their living conditions were dirty and unfit for a child, and Shirley's time was divided between caring for her child and caring for the terminally ill Perscheid. When J.R.E.K. was eight or nine months old, Shirley began using again.

On February 1, 2002, Shirley left J.R.E.K. in the care of Perscheid. When Perscheid became critically ill and went to the hospital, he called a friend, Angela Rubattino, and told her to pick up the child from his residence. Rubattino had a history with Child Protective Services, had a criminal record, and lived with a registered sex

offender. Shirley could not locate J.R.E.K. Rubattino called CPS about the child on February 8. On February 10, after responding to a domestic violence call at Rubattino's home, police removed the child. On February 14, Shirley signed a voluntary agreement placing J.R.E.K. in foster care.

Perscheid died on February 2. That same day, while J.R.E.K. was still missing, Shirley had intercourse with roommate and meth user Grant Phillips. J.H.G.K. was apparently conceived on that date. Shirley claims that J.H.G.K. could not be the child of Perscheid, because he was sterile. Regardless of who fathered J.H.G.K., both men are now deceased: Phillips was murdered in 2004. One week later, Shirley was arrested and jailed on a drug charge. During her three weeks in jail, she discovered that she was pregnant. She stopped using, and began to engage in services offered by the Department. However, between February and November 2002, Shirley only visited J.R.E.K. three times. When J.H.G.K. was born, there was concern that she had been exposed to meth in utero. After treatment at the Pediatric Interim Care Center, she was removed from Shirley's care, and immediately placed in the foster care of Kim Metcalf, a church acquaintance of Shirley's. Shirley signed a voluntary placement agreement for J.H.G.K. in January 2003.

Shirley then began participating in offered services and submitting weekly urine analyses which were clean for many months in a row. She took parenting classes, job training, earned her high school diploma, and got a full-time job at a clothing store. She found stable housing in her aunt's mobile home. Through a process of incremental visitation, first at the children's daycare and then at Shirley's home, the children were

integrated into her life. In October 2004, they were returned to Shirley's full-time care.

Unfortunately, during the same time she was making this progress, Shirley became engaged to another meth user, Eric Baker. Baker was jailed on drug offenses twice during his two-year relationship with Shirley. Baker moved into the mobile home and began dealing drugs on the premises, so the landlord evicted them. Within a month after reunification with her children, Shirley had lost her job and her home, and began using meth again. The family moved from home to home between October and December.

Shirley lost track of the children while they were visiting others over the Christmas holidays. They were removed from Shirley's care again in an emergency hearing on January 6, 2005. Shirley submitted a urine sample January 9 that was positive for meth. The court ordered her to submit to a new drug evaluation and two urinalysis tests per week. After 60 days, if she stayed clean, the children would be returned to her. She submitted several clean analyses, and a social worker arranged for the earliest possible drug evaluation, on March 1. But Shirley did not keep the appointment. In early February, she disappeared from all contact.

From February to June 2005, Shirley was using meth regularly. She moved from place to place, and was still involved with Eric Baker until his arrest in late March. In late May, she became involved with Scott Shirley, a man with whom she had been acquainted since Christmas. They dated for one month and were married in Las Vegas in July. Soon after, Mr. Shirley lost his job. The couple returned to Seattle briefly in late July, and then moved to Montana where Ms. Shirley's father had arranged a job for

Mr. Shirley as a construction foreman. He was fired from that job when he missed too much work to be with his wife at court appearances. By the time of the termination hearing, he had found another job with a cellular phone company. Mr. Shirley has a criminal history, including a DUI and a felony eluding conviction, which he had not disclosed to Ms. Shirley at any time before the hearing. The couple lived with family in Montana until August 1, when they rented a large house.

In May 2005, after Shirley had disappeared for three months, the State petitioned to terminate her parental rights. Shirley heard about the petition in late July, and filed a response on August 8. She arranged to visit the children twice in September. At the hearing in early October, Shirley testified to her new-found sobriety and marital status. She acknowledged that her drug relapses had caused her great difficulty, but claimed she could quit cold turkey and blamed her relapses on traumatic events in her life. She stated repeatedly that she would not relapse again because the pain of losing her children would be too great. Apparently, she was undergoing a new drug evaluation in Montana.

A number of different caseworkers and caregivers testified for the State. Although none of them disputed that Shirley was capable of some good parenting skills when sober, they expressed concern about the welfare of the children and about Shirley's ability to put them first, cope with adversity, and avoid relapse into drug use. Diana Vanatta, J.R.E.K.'s paternal grandmother, said that J.R.E.K. shied away from Shirley, and began acting out, having sleeping problems, and wetting his pants after Shirley's first September 2005 visit. Kim Metcalf, J.H.G.K.'s foster mother, said that the

child had started waking up scared and acting unusually clingy after the visit. Betsy Ensign, social worker, said that Shirley could not understand why it would be difficult for the children to see her after such a long absence. Lana Farrington, family preservation therapist, was frustrated at her inability to contact Shirley at appointed times, and was concerned that Shirley had lied about her meth use as recently as January 2005.

Social worker Jessica Chaney expressed concern about Shirley's true stability, and said that her reappearance with a new husband and home had not changed her opinion that Shirley's rights should be terminated. Chaney said that since her reappearance in early September, Shirley had repeatedly refused to provide the drug evaluation paperwork Chaney requested. Katherine LeBrun, the children's court appointed special advocate, said Shirley ignored LeBrun's concerns about Eric Baker, and denied meth use even when faced with a positive urinalysis result. LeBrun also said that from the standpoint of a four-year-old, Shirley created too much trauma and instability. Chaney and LeBrun both recommended termination, because Shirley would need a minimum of one year of continued services, sobriety, and stability before reunification could be considered.

The trial court terminated Shirley's parental rights. Shirley appeals.

I.

A court may terminate parental rights if the State proves the elements of RCW 13.34.180(1) by clear, cogent and convincing evidence.¹ "Clear, cogent and

¹ RCW 13.34.190(1).

convincing” means highly probable.² The court’s factual findings under RCW 13.34.180(1) must be upheld if supported by substantial evidence from which a rational trier of fact could find the necessary facts by clear, cogent, and convincing evidence.³ The trial judge has the advantage of having the witnesses before him or her, and deference to the findings is of particular importance in deprivation proceedings.⁴ Even if the elements of RCW 13.34.180(1) are proven, the trial court must also find that termination is in the best interests of the child by a preponderance of the evidence.⁵

II.

Under RCW 13.34.180(1), the State must allege and prove six elements in support of a parental termination petition. Only three of the six are at issue in this case:⁶

(d) That the services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;

(e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future and;

(f) That continuation of the parent and child relationship clearly

² In re Dependency of K.R., 128 Wn.2d 129, 141, 904 P.2d 1132 (1995); In re Sequo, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

³ RCW 13.34.190; In re Dependency of C.B., 61 Wn. App. 280, 286, 810 P.2d 518 (1991).

⁴ In re K.R., 128 Wn.2d at 144; In re Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980).

⁵ RCW 13.34.190(2); In re K.R., 128 Wn.2d at 140-41.

⁶ The three uncontested elements are: “(a) That the child has been found to be a dependent child; (b) That the court has entered a dispositional order pursuant to RCW 13.34.130; (c) That the child has been removed or will, at the time of the hearing, have been removed from the custody of the parent for a period of at least six months pursuant to a finding of dependency.” RCW 13.24.180(1)(a – c).

diminishes the child's prospects for early integration into a stable and permanent home.^[7]

Shirley challenges the sufficiency of the State's evidence in relation to each of these elements.

Necessary Services

Shirley argues that because the Department never provided drug treatment despite her difficulties with meth use, she did not receive all necessary services under RCW 13.34.180(1)(d). If a service is not necessary, then under the plain language of the statute, the Department is not required to provide it. When the Department offers a service, but the parent refuses to participate, RCW 13.34.180(1)(d) is satisfied.⁸

According to the evidence before the trial court, drug treatment was not necessary to correct Shirley's parental deficiencies in 2003, so the Department was not required to provide it at that time. In the spring of 2003 when her first drug evaluation took place, Shirley was in the midst of a long period of abstinence from meth. Weekly urine analysis testing showed that Shirley had not used since November 2002. No treatment was ordered after the drug evaluation. Apparently, no treatment was necessary, because Shirley remained clean throughout 2003 and most of 2004, during which time she utilized many other offered services, obtained her GED, got a job, and successfully transitioned the children back into her own care. Not only did the Department comply with RCW 13.34.180(1)(d), but the process worked, and Shirley got her children back.

⁷ RCW 13.34.180(1)(d)-(f).

⁸ In re Welfare of Ferguson, 41 Wn. App. 1, 6, 701 P.2d 513 (1985).

In January 2005, after Shirley relapsed and a new drug evaluation was ordered, Shirley declined to participate. Had she done so, treatment might have been ordered. Instead, she missed her drug evaluation appointment and disappeared entirely. She knew about the appointment, and claimed she would have gone had it been scheduled sooner. Although Shirley may have been in the midst of a new evaluation at the time of the termination proceeding, the Department fulfilled its obligation to provide services to her in January, five months before the termination proceeding began. Because Shirley does not allege the failure in provision of any other services, her argument fails. The trial court's determination on this issue was proper.

Likelihood Conditions Will Be Improved in Near Future

Shirley argues that the trial court erred in concluding that there was little likelihood conditions would be improved such that the children could be returned to her in the near future. A trial court must evaluate whether parental deficiencies have been corrected, and the "near future" is judged from the child's point of view, not the parent's.⁹ This court considered a similar case in 2001 and concluded that, despite a mother's obvious love for children,¹⁰ her participation in services,¹¹ and a potential reunification after a year of additional services, a year or more was not the "near future" for a six-year-old child who had been out of her mother's care for her entire life.¹²

Shirley's major parental deficiencies are instability, frequent homelessness, child

⁹ In re Dependency of T.R., 108 Wn. App. 149, 166, 29 P.3d 1275 (2001). See also In re Dependency of A.C., 123 Wn. App. 244, 249, 98 P.3d 89 (2004) (one year from date of trial not "foreseeable future" for three-year-old child).

¹⁰ In re T.R., 108 Wn. App. at 153.

¹¹ In re T.R., 108 Wn. App. at 157.

¹² In re T.R., 108 Wn. App. at 165-66.

neglect during repeated periods of drug use, poor choice of personal relationships with other meth users, putting her boyfriends before her children, and tending to relapse into meth use when faced with adversity. As a show of improvement, at the termination hearing claiming she had been free of drugs for three months, had married a man in July whom she had dated for one month, had moved to Montana to escape her past drug connections, had been renting a house for one month, and had looked into local schools and activities for the children in Montana. But on its face, her situation was no different from her situation in October 2004, when the children were first returned to her. Then, Shirley had been drug free for two years, had a home, a job, and a fiancé. Yet she relapsed into meth use, was evicted, lost her job, and began to neglect the children again within two months. Knowing this history, caseworkers at the termination proceeding properly recommended at least one year of continued services, sobriety, and stability before reunification could be considered.

In addition to the State's evidence, Shirley's evidence showed that she had not gained the skills to care for her children, or overcome her tendency to relapse when faced with hard times. Rather than taking responsibility for her drug abuse, she blamed other people and circumstances. She blamed the Department for not telling her she should choose between Baker, a convicted drug dealer and user, and the children. Shirley admitted that the children's latest transition back to her care must be gradual, yet she had moved to Montana and lacked the funding to visit the children three times a week, which was what her caseworker recommended. When asked repeatedly how she evaluated her risk of relapse, she responded that she would not relapse because

she could not “live with the pain” of being without the children. However, she did not explain how her current situation differed from October 2004 when her will power failed to prevent relapse. Shirley’s new husband had not disclosed his past criminal or alcohol abuse history to her, but after the State produced evidence of it at the hearing, he finally disclosed to her that he had a DUI and a felony conviction. He had three different jobs in as many months. Shirley’s children were ages three and four at the time of the termination hearing. Except for the period from October to mid-December 2004, both children had been in the care of others for the previous three years.

The State presented substantial evidence, clear, cogent, and convincing enough to persuade a trial court that reunification was not possible in the near future, from the children’s point of view. Although there is no dispute that Shirley has shown some improvement in her situation, there was substantial uncontroverted evidence that the children could not be placed with her for at least another year. For three and four year-old children whose entire lives had been in limbo, another year was too long to wait. The trial court properly concluded that there was little likelihood that conditions would be remedied in the near future.

Early Integration Into a Stable and Permanent Home

Shirley contends that the State did not prove that continuing foster care would be harmful or traumatic to the children, and that therefore their prospects for early integration into a stable and permanent home were not diminished.

Shirley’s argument ignores the actual test to be applied: whether the continuation of a legal parent-child relationship is an obstacle to finding a stable and

permanent home for the children as soon as possible.¹³ Whether the child's current placement provides safety and stability is irrelevant.¹⁴ Even if the parent demonstrates that someday she may be able to provide stability, "what is perhaps eventually possible for the parent must yield to the child's present need for stability and permanence."¹⁵ Again, whether the potential integration is "early" is seen from the child's point of view, and this court has found that one year is too long for even a six-year-old child to wait.¹⁶

There is substantial evidence in the record that continuation of the legal relationship between Shirley and these children would impede their early integration. Shirley does not challenge the caseworker assessments that she would need to continue with services, drug evaluations and possible treatment, visitation, and a slow reintegration of the children into her life. If the trial court had not terminated the legal parent-child relationship, the children would have endured at least one more year of instability, uncertainty, and impermanence. And that scenario assumes no relapse by Shirley, which is by no means certain. The trial court properly found that Shirley's continued legal claims impeded the children's chances for early integration into a stable and permanent home.

Best Interests of the Children

The final question in a termination proceeding is whether termination is in the

¹³ In re Dependency of K.S.C., 137 Wn.2d 918, 927, 976 P.2d 113 (1999). See also In re A.C., 123 Wn. App. at 256.

¹⁴ See In re Dependency of A.V.D., 62 Wn. App. 562, 569-70, 815 P.2d 277 (1991) (child "thriving" in stable care of maternal grandmother still foster child, unless parent resumes custody or rights are terminated this element not satisfied).

¹⁵ In re T.R., 108 Wn. App. at 166.

¹⁶ In re T.R., 108 Wn. App. at 166.

child's best interest by a preponderance of the evidence.¹⁷ The factors are not specifically defined. The trial court must look at the facts and circumstances of each case.¹⁸ If the rights of the parent and the welfare of the child conflict, the child's rights and safety prevail.¹⁹ Shirley again focuses on the possibility of eventual reunification and her recent attempts to show stability as evidence that termination was not in the best interests of the children.

Reunification with Shirley would be extremely difficult for the children. J.R.E.K. has spent the last three years in foster care, most recently with his grandmother Diana Vanatta for over a year. J.H.G.K. has been in foster care with Kim Metcalf for her entire life. Although they did have frequent visitation with Shirley during 2003-2004, they did not live with her, nor was she the primary caretaker of either child except during October and November. From February to October of 2005, the children saw Shirley twice. She was homeless and unemployed for most of 2005, using meth, and engaged to a drug dealer and user whom she only left after he was arrested in March. She started a relationship with Scott Shirley in June, married him in July, and moved with him to Montana in August. The children have never met him, nor have they ever been to Montana. Even assuming that Shirley's newfound stability is permanent, placement of the children in her custody in Montana would be a complete upheaval of their lives. Both children have always lived in Seattle. What stability they have known has been with other caretakers, not with Shirley.

¹⁷ RCW 13.34.190(2).

¹⁸ In re A.V.D., 62 Wn. App. at 572.

¹⁹ RCW 13.34.020.

Shirley had opportunities to prove her ability to consider the best interests of these children. She regained custody once, but immediately relapsed into drug use and chaos. When the court gave her 60 days to clean up and get the children back again, Shirley refused services, disappeared, and used meth. The trial court properly considered Shirley's history and future prospects for stability, as well as the potential harm that reunification would have on children, when making this determination. The evidence supports the finding that termination was in the best interests of the children.

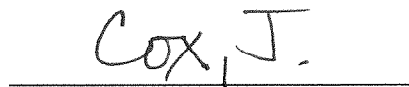
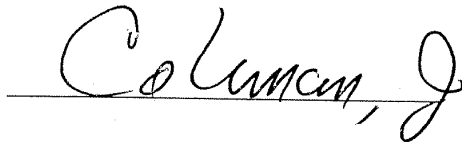
III.

Terminating parental rights is a difficult decision, not to be made lightly. But the trial court heard substantial evidence in support of the statutory elements that the State was required to prove. Although Shirley's current living circumstances are hopeful, they are very recently achieved and built on a fragile foundation, capable of quick collapse. J.R.E.K. and J.H.G.K., who have never been able to rely on Shirley for proper care, cannot wait in limbo to discover whether the current transformation proves to be long term. The trial court's decision was proper.

AFFIRMED.

A handwritten signature in cursive script, appearing to read "Baker, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Cox, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Coleman, J.", written over a horizontal line.